

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MARC J. MURI, individually and on behalf of
all others similarly situated,

Plaintiff,

—against—

NATIONAL INDEMNITY COMPANY,

Defendant.

17-cv-00178-JMG-CRZ

CLASS ACTION

PLAINTIFF’S RESPONSE
DEFENDANT’S NOTICE OF
SUPPLEMENTAL AUTHORITY

Plaintiff Marc J. Muri (“Muri”) respectfully submits this response to Defendant National Indemnity Company’s (“NICO”) notice of the June 4, 2019 decision of the Eighth Circuit Court of Appeals in *Usenko v. MEMC LLC et al.*, Case No. 18-1626. (Dkt. No. 126.) The *Usenko* decision provides no support for Defendant’s misguided motion for summary judgment.

In *Usenko*, the Eighth Circuit confirmed the holding of the U.S. Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), that a claim for a breach of fiduciary duty of prudence under ERISA cannot survive a motion to dismiss where a plaintiff “alleges that the defendants breached their fiduciary duties because they failed to ‘outperform the market based *solely* on their analysis of publicly available information[.]’” (Slip Op. at 7 (quoting *Dudenhoeffer*, 573 U.S. at 427 (internal brackets omitted) (emphasis added)).) Defendant claims that “*Usenko* refutes Plaintiff’s claim that NICO breached a duty to monitor by failing to investigate and act upon adverse public information about Valeant” (Dkt. No. 126 at 2.)

Defendant continues to mischaracterize Plaintiff’s claims, as this Court has already explained once before in discussing why *Dudenhoeffer*—and, by extension, now *Usenko*—does not apply to “refute” any of Plaintiff’s claims:

Indeed, as previously discussed, Muri's complaint is not based *solely* on the argument that the market was overvaluing the Valeant stock—*i.e.*, that Valeant's stock price was artificially inflated. Rather, Muri contends that National Indemnity failed to adequately monitor, and investigate, the Sequoia Fund's prudence amid various warning signs—only one of which happened to be the suspected overvaluation of Valeant stock. And as Muri correctly points out, *Dudenhoeffer* does not directly address those situations.

(Dkt. No. 38 at 11 n.2 (internal brackets and quotation marks omitted, emphasis in original).)

Defendant's summary judgment motion remains without merit and should be denied.

Dated: New York, New York
June 11, 2019

By: /s/ Samuel E. Bonderoff
Samuel E. Bonderoff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served electronically, on June 11, 2019, on all counsel or parties of record on the service list.

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